

THE PROTECTION OF THE CONSUMER UNDER MODERN SALES LAW, PART 1*

A Comparative Study

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Introduction. American courts, particularly during the last decade, have become increasingly aware of the need for protecting the consumer against dangers inherent in the use of defective goods. In few other fields of law has Corbin's advice to treat rules of law as "tentative working rules" been more heeded.¹ Continuously and relentlessly our law has expanded contract and tort liability so as to satisfy public needs. Classical contract theory has undergone profound modifications in response to drastic changes in the structure of the distribution process. Our sales law and particularly the law of warranties likewise has changed. Where contract liability has been regarded as inadequate, it has been supplemented by tort law. There is an ever increasing tendency to permit the consumer injured by defective goods or services to reach the producer directly, if not with the help of contract law, then with the help of a revised law of torts. Not only has the decline of the rules of privity permitted the consumer to reach the producer, but product liability, in contrast to the tenets of classical tort law, is straining away from negligence. In a fascinating blending of tort and contract law, product liability increasingly is becoming strict liability. A theory of enterprise liability has emerged, frequently based on vague and unanalyzed notions of public policy and economics.

The dramatic changes in our law make a comparison of its development with that occurring in civil law countries most tempting. Developments in the market patterns in Western countries have followed similar if not identical lines. Have these legal systems also responded to the challenges of market organization in similar ways? It is proposed in this article to examine on a comparative basis two main problems: The following pages will examine the patterns underlying warranty of quality. The status of the remote consumer or user of defective goods vis-a-vis the manufacturer will be examined in the second installment.

THE SELLER'S RESPONSIBILITY FOR QUALITY

1. *The Basic Pattern*

A comparative study of the seller's responsibility for quality presents peculiar difficulties. Warranty law in many legal systems has not achieved the degree of rationality which is to be expected of a sales law satisfying the needs of modern society. There is a considerable amount of confusion and

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1. 1 CORBIN, CONTRACTS § 3 (1963 ed.).

tension in civil and common law countries alike. English and American law are not in agreement.² American decisions are frequently conflicting, not because of a healthy disagreement on social policy, but because of the lingering impact of rules whose policies are long since dead. To overcome these obsolete traditions, American courts have all too frequently resorted to the technique of "backdoor building," to use Llewellyn's telling phrase, much to the detriment of clear lines of rational development. The situation on the continent of Europe is not altogether different. Almost everywhere warranty law still shows the traces of its historical connection with the sale of specific goods,³ so that many sales laws still differentiate between the sales of specific and generic goods in cases involving nonconforming delivery.⁴ Perhaps the most dramatic illustration of the difficulties in breaking with the past is the long struggle of warranty law with *caveat emptor*, the principle that "he who does not open his eyes, opens his purse" — a maxim reflecting a phase in the universal history of sales law when a sale was a cash and carry transaction.⁵

In the process of widening the seller's responsibility for quality, the techniques used by the civil and the common law were remarkably similar. Both systems, in addition to according protection against fraudulent concealment (*dolus*), allowed the buyer to bind the seller with formal collateral promises of warranty.⁶ In both systems the gradual expansion of responsibility for quality proceeded along similar lines. The formalism to which warranties were subjected was relaxed more and more until finally sales law accorded protection against any hidden material defects unless the parties had agreed otherwise. In the civil law, where Roman law furnished the pattern of evolution, the break with *caveat emptor* by means of implied warranties occurred rather early.⁷ The common law, by contrast, experienced a relapse to the

2. For a penetrating criticism of English sales law, see Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods, Parts I & II*, 15 MOD. L. REV. 425 (1952), 16 MOD. L. REV. 174 (1953).

3. Rabel, *The Nature of Warranty of Quality*, 24 TUL. L. REV. 273-77 (1950). 2 RABEL, DAS RECHT DES WARENKAUFS, 9a ZEITSCHRIFT FUER AUSLAENDISCHES & INT'L. PRIVATRECHT [hereinafter cited as 2 RABEL] 102-03 (1958).

4. See notes 17-23 *infra* and accompanying text.

5. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). HUBNER, GRUNDZUEGE DES DEUTSCHES PRIVATRECHT 579 (5th ed. 1930). Cf. *Edwards v. Hathaway*, 1 Phila. 547 (Pa. D.C. 1855): "His eyes . . . are his market"; 2 RABEL at 274.

6. The *dicta* and *promissa* available to the Roman buyer anxious for protection had to be precise in content and had to be incorporated in the sales contract. Seckel-Levy, *Die Gefahrtragung beim Kauf im Klassischen Roemischen Recht*, 47 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (ROM. ABR.) 117, 137, 202 (1927); but see BUCKLAND, A TEXTBOOK OF ROMAN LAW 491 (3d ed. 1963). The common law offers a striking parallel. In the celebrated case of *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. Ch. 1603), "the bare affirmation" of a jeweler that the stone sold was a "bezar-stone" was regarded as an insufficient warranty because the seller had not used the correct words of warranty.

7. The phrase *caveat emptor* is not itself of Roman origin, but the principle existed in the earliest Roman Law. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 272 (1931).

On influence of canon, natural and Germanic laws, see 2 RABEL 112; RABEL, HAFTUNG DES VERKAUEFERS 321-24 (1902).

principle of *caveat emptor*, so that the break had to begin anew in the last century, and the process of emancipation is not as yet complete.

The Civil Law. Under the Roman *ius civile*, the buyer was protected against hidden defects only if the seller was fraudulent or had given an express warranty. Fraud, for the Roman, included nondisclosure of known defects as well as misrepresentation and concealment.⁸ If the seller breached his limited duties the buyer had an action for damages.⁹ The magistrates who had jurisdiction over the market, the *curule aediles*, created and administered a warranty law which went a good deal further than the *ius civile*. The *aedilician law* provided two additional remedies which were available even against a non-fraudulent seller who had made no express warranty: within a limited period of time, the buyer of a defective commodity was entitled to rescission or diminution of the purchase price.¹⁰ The *Corpus Juris*, which brought together civil and aedilician law, preserved the two systems of warranty liability.¹¹

The civil law, continuing to expand the protection of the buyer against significant hidden defects, has tried to develop a workable concept of defect. Broadly speaking, it has a dual test for defect: a commodity is defective if it is unfit either for ordinary use or for the particular use contemplated by the parties.¹² But in providing a remedy for defects the civil law has not always

8. BUCKLAND & McNAIR, *ROMAN LAW AND COMMON LAW* 300 (2d ed. 1936).

9. JOERS-KUNKEL, *ROEMISCHES PRIVATRECHT* § 144, 2-3 *ENZYKLOPAEDIE DER RECHTS- UND STAATSWISSENSCHAFT* (3d ed. 1949); DE ZULUETA, *THE ROMAN LAW OF SALE* 6-9, 46-50 (1945).

10. To suppress sharp practices, aedilician law required dealers publicly to disclose enumerated defects in commodities as important as slaves and draft animals and to give, on request, a stipulation warranting the absence of such defects. Gradually the seller's responsibility for defects was extended to protect the buyer even without a warranty; and eventually protection was accorded against all hidden defects. JOERS-KUNKEL, *op. cit. supra* note 9, at 234-35. JOLOWICZ, *HISTORICAL INTRODUCTION TO ROMAN LAW* 303-04 (1932). This seems in substance to have amounted to an implied warranty of merchantability.

11. See DIGEST 19.1.13; *id.* 21.1.28.63.

12. BUEGELICHES GESETZBUCH § 459 (Ger. 22d ed. Palandt 1963) [hereinafter cited as GERMAN CIVIL CODE]; OBLIGATIONENRECHT art. 197 (Switz. 1947) [hereinafter cited as SWISS CODE OF OBLIGATIONS]; CODE CIVIL art. 1641 (Fr. 57th ed. Dalloz 1958) [hereinafter cited as FRENCH CODE CIVIL]. The civil law thus combines objective and individual (concrete) criteria in defining a defect. FLUME, *EIGENSCHAFTSIRRTUM UND KAUF* 114-18 (1948); von Caemmerer, *Falschlieferung*, in *FESTSCHRIFT FÜR MARTIN WOLFF* 13 (1952) (German law); 2 JOSSERAND, *COURS DE DROIT CIVIL POSITIF FRANÇAIS* no. 1119 (1930) (French law); 2 ALMEN-NEUBECKER, *DAS SKANDINAVISCHES KAUFRECHT* 1 (1922). Lack of fitness for a particular purpose, however, amounts to a defect only if the particular purpose has become part of the bargain. GERMAN CIVIL CODE § 459 (1); 2 SOERGEL-SIEBERT, *BUEGELICHES GESETZBUCH* § 459 Anm. 6 (9th ed. 1962); 2 JOSSERAND, *op. cit. supra*, at no. 1119.

Some civil law countries, rather inconsistently, regard the delivery of goods which do not conform with an express warranty of quality as an ordinary breach of contract and, therefore, not governed by the special rules of "warranty" law. 4 *RECHTSVERGLEICHENDES HANDWOERTERBUCH* 727, 755 (1933); 2 RABEL 144. For a further discussion of French law, see Morrow, *Warranty of Quality: A Comparative Survey*, 14 *TUL. L. REV.* 529, 547 (1940).

succeeded in emancipating itself from the Roman scheme of remedies which granted damages to the victim of a fraudulent seller and the aedilician remedies to the victim of an innocent seller who had not given a warranty. The limitation of the buyer's remedies to rescission and price diminution if the seller were innocent greatly appealed to the sense of equity of the drafters of the civil codes.¹³ The German code, for instance, is still patterned along Roman lines.¹⁴ As we shall see in the second section, however, modern German case law is gradually modifying the code and is expanding damage liability.¹⁵ And both the cases and codes of other legal systems, such as the French, have gone a good deal farther than the German law.¹⁶

Along with this distinction between fraudulent and innocent sellers, the Roman law distinction between specific and generic goods has survived in European civil law. Roman law, even in the post-classical period, retained the early notion that a sale is a transaction involving specific goods or part of a quantity belonging to the seller. The "sale" of generic goods was not treated as a sales contract.¹⁷ The parties to a sale of generic goods had to resort to the formal promissory contract, the *stipulatio*, which required that all the terms be spelled out. Consequently, all warranties had to be expressed. This resulted in the widespread use of standardized stipulations pertaining to the quality of goods, particularly in the great wholesale grain and wine trades.¹⁸ Nonconforming delivery was treated as a breach of contract giving rise to an action for damages, rather than the aedilician remedies. To be sure, under modern sales law the concept of a sales contract has been broadened to include generic goods sold by description.¹⁹ But nonconforming delivery in such sales is still often treated as a breach of contract,²⁰ giving rise to a right to demand

13. 1 WILLISTON, SALES § 247 (rev. ed. 1948).

14. GERMAN CIVIL CODE §§ 459, 460, 462-63; JOERS-KUNKEL, *op. cit. supra* note 9, at 235; cf. FRENCH CODE CIVIL arts. 1641-49. For a discussion of French law, see Mazeaud, *La Responsabilité Civile Du Vendeur-Fabricant*, 53 REV. TRIM. DROIT CIVIL 611 (1955); Morrow, *supra* note 12, at 529-56 (1940).

15. Text accompanying notes 60-71 *infra*.

16. Text accompanying notes 72-77 *infra*.

17. JOERS-KUNKEL, *op. cit. supra* note 9, at § 140, par. 3.

18. 2 RABEL 103.

19. In fact, going beyond Roman law, mercantile custom in northern Europe dating back to the Middle Ages developed its own "warranty" law applicable to sales of generic goods, which entitled the buyer to reject the tender of goods not conforming to mercantile standards. See 2 GOLDSCHMIDT, HANDBUCH DES HANDELSRECHTS § 62 (2d ed. 1883); Barbour, *The History of Contract in Early English Equity*, in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 115, 116 (ed. Vinogradoff 1914); 2 RABEL 163-64.

20. Von Caemmerer, *supra* note 12, at 3-32 (comparative law); Enneccerus-Lehmann, *Recht der Schuldverhältnisse*, in 2 LEHRBUCH DES BÜRGELICHEN RECHTS § 103, II, 1a (15th ed. 1958) (German law); 10 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no. 126 (2d ed. 1956). Delivery of an "aliud" has also caused difficulties to the common law. *Chanter v. Hopkins*, 4 M & W 399, 150 Eng. Rep. 1484 (1838); *Stoljar* (pt. I), *supra* note 2, at 432-36.

conforming delivery²¹ or damages, while the aedilician rules governing breaches of "warranty" involving specific goods, such as the duty to notify, the immediate right to rescind, and a short statute of limitations, frequently do not apply.²² The buyer of specific goods, on the other hand, is not entitled to demand conforming delivery. Gradually, however, a process of assimilation in the treatment of specific and generic sales is emerging.²³

The Common Law. At the time when civil law was seeking to develop sophisticated warranty law, the common law still was stubbornly clinging to the principle of *caveat emptor*.²⁴ In fact, from the 17th century on *caveat emptor* gained a new lease on life, because of the powerful influence of an emergent individualism and notions of laissez-faire which strongly opposed the mediaeval regulation of quality by guild, church and state. Widespread abuses had caused a breakdown in the administration of quality control, and the whole system had fallen into disrepute.²⁵ Thus Lord Mansfield's rejection of the maxim

21. See, e.g., GERMAN CIVIL CODE §§ 459, 462, 480. The remedies of the buyer find, however, their limitation in the principle of good faith which may permit the seller to cure. In most civil law countries the buyer of specific goods, by contrast, is not entitled to demand or under a duty to accept cure. S. A. and D. v. B., Reichsgericht (II, Zivilsenat), Nov. 6, 1917, 91 Entscheidungen des Reichsgericht in Zivilsachen [hereinafter cited as R.G.Z.] 110 (Ger.); SCANDINAVIAN SALES ACT § 49; SWISS CODE OF OBLIGATION art. 206. UNIFORM COMMERCIAL CODE [hereinafter cited as UCC] § 2-508 presents a striking parallel. See Honnold, *The Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949). But for the French law, see 19 BAUDRY-LACANTINERIE & SAIGNAT, TRAITÉ THÉORETIQUE ET PRATIQUE DE DROIT CIVIL § 434 (3d ed. 1908). For the Austrian law, see ALLGEMEINE BÜRGERLICHE GESETZBUCH § 932a (Aus. 26th ed. Kapfer 1960).

22. 2 RABEL 284.

23. HANDELSGESETZBUCH § 378 (Ger. 13th ed. Baumbach-Duden 1959) [hereinafter cited as GERMAN COMMERCIAL CODE], as interpreted in S. W. v. B. & W., Reichsgericht (II, Zivilsenat), Dec. 18, 1914, 86 R.G.Z. 90; UNIFORM SALES ACT [hereinafter cited as USA] § 49; UCC § 2-601. For a discussion of the UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS art. 33, see note 113 *infra*.

24. *Hoe v. Sanborn*, 21 N.Y. 552 (1860), could still maintain that common and civil law applied fundamentally different principles:

The rule of the civil law, viz., *caveat venditor*, was adopted at an early period, and in reference, as it would seem, rather to those articles which are of general and ordinary use, than to such as enter extensively into the commerce of the country; while that of the common law, viz., *caveat emptor*, originating in a commercial age, and among a highly commercial people, naturally took the form best calculated to promote the freedom of trade. No doubt the common law rule is, upon the whole, wisest and best adapted to an advanced state of society; and yet there is a large class of cases in which that of the civil law would serve to prevent a multitude of frauds. Take, for instance, the article of horses. Few would deny that, as to them, it would be more conducive to justice if the vendor were, in all cases, held to warrant against secret defects. But, as it would be impracticable to discriminate among the infinite variety of articles which are the subjects of sale, the common law applies the maxim *caveat emptor*, as a general rule, to all cases.

Id. at 558.

25. Le Viness, *Caveat Emptor Versus Caveat Venditor*, 7 MD. L. REV. 177, 182 (1943).

that a sound price warrants a sound commodity²⁶ met with general approval in England as well as in most of the United States. Supported by powerful arguments of public policy, the rule became firmly established that in the absence of an express warranty or fraudulent misrepresentation, the seller was not responsible for defects. In the words of Chief Justice Gibson of Pennsylvania:

The relation of buyer and seller, unlike that of *cestui que trust*, attorney and client, or guardian and ward, is not a confidential one; and if the buyer, instead of exacting an explicit warranty, chooses to rely on the bare opinion of one who knows no more about the matter than he does himself, he has himself to blame for it. If he will buy on the seller's responsibility, let him evince it by demanding the proper security; else let him be taken to have bought on his own. He who is so simple as to contract without a specification of the terms, is not a fit subject of judicial guardianship. Reposing no confidence in each other, and dealing at arm's length, no more should be required of parties to a sale, than to use no falsehood; and to require more of them, would put a stop to commerce itself in driving every one out of it by the terror of endless litigation. . . .²⁷

Indeed, *caveat emptor* had a strong impact on and retarded the development of not only implied but also express warranties.²⁸

But at the time Chief Justice Gibson wrote his famous lines, the erosion of *caveat emptor* was already well underway. Since to an ever increasing extent trade was being conducted in goods not there to be seen, the needs of the business community demanded, to use Gibson's own language, protection of the buyer who "was necessarily compelled by the circumstances to deal on the faith of the vendor's description."²⁹ The Massachusetts court in *Bradford*

26. *Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15, 16 (K.B. 1778):

Selling for a sound price without warranty may be a ground for an assumpsit, but in such a case, it ought to be laid that the defendant knew of the unsoundness.

In *Parkinson v. Lee*, 2 East 314, 102 Eng. Rep. 389, 392 (K.B. 1802), Grose, J. informs us that the rule was rejected by Lord Mansfield, who found it "so loose and unsatisfactory a ground of decision . . ."

27. *McFarland v. Newman*, 9 Watts 55, 57, 34 Am. Dec. 497, 499 (Pa. 1839). Also see *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383, 388 (1870).

28. Compare *McFarland v. Newman*, *supra* note 27, with its emphasis on the requirement of an intention to warrant with UCC § 2-313; Note, 57 YALE L.J. 1389 (1948), commenting on the UNIFORM REVISED SALES ACT OF 1948.

Unfortunately, the UCC in attempting to modernize the law of express warranty, has created new difficulties by introducing a "basis of the bargain" test which replaces the intention to warrant still followed in English sales law as well as the reliance test laid down in USA § 12. It is submitted that this formula adopts the liberal view taken in 1 WILLISTON, SALES § 206 (rev. ed. 1948) while at the same time making sure that the expectation of the buyer must be legitimate. See UCC § 2-313, Comment 3. The section is discussed by Honnold, "Study of the Uniform Commercial Code," N.Y. Law Rev. Commission, Leg. Doc. No. 65(e) 58 (1955). Section 2-313 has revived old case law by making warranties of description and sample express rather than implied warranties.

29. *McFarland v. Newman*, 9 Watts 55, 57, 34 Am. Dec. 497, 498 (Pa. 1839). The great jurist was most careful to limit this defense of *caveat emptor* "to the sale of a thing

*v. Manly*³⁰ had already treated the exhibition of the sample "as a silent symbolical warranty, perfectly understood by the parties." Chief Justice Parker, in an opinion which may have been ahead of its time, informs us that "it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples [if there were no action except on express warranties or false affirmation]."³¹ Claiming to carry out the intention of the parties, case law also revived old mercantile tradition, and gradually imposed on manufacturers, growers and dealers who sold by description an implied warranty to deliver goods of a quality as high as that of goods sold in the market under the same description,³² known as the warranty of merchantability. Eventually classified as warranties implied by law,³³ the warranties created from sales by sample and description came to accord protection to the buyer of generic as well as specific goods, to the buyer for resale as well as the buyer for use.³⁴

To round out the buyer's protection a warranty of fitness for a particular purpose communicated to the seller appeared quite early.³⁵ It came to include

accepted by the vendee after opportunity had to inspect and test it . . ." *Id.* at 56-57, 34 Am. Dec at 498; see *Jones v. Just*, L.R. 3 Q.B. 197 (1868).

The evolution of the case law and the changes in the mercantile background are given in LLEWELLYN, *CASES ON SALES* 268-69 (1930); Llewellyn, *On Warranty of Quality and Society* — I, 36 COLUM. L. REV. 699 (1936).

30. 13 Mass. 138 (1816).

31. *Id.* at 142.

Among fair dealers there could be no question but the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented, if the law should refuse its aid to the party who had been deceived in a purchase so made . . . [A] sale by sample is tantamount to an express warranty.

Id. at 143, 145.

32. *Gardiner v. Gray*, 4 Campb. 144, 171 Eng. Rep. 46 (1815); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 121, 125-39, 146 (1943). On the variant meaning of merchantability, depending on the contractual context, see *Mathier v. George A. Moore & Co.*, 4 F.2d 251 (N.D. Cal. 1925). Isaacs, *The Industrial Purchaser and the Sales Act*, 34 COLUM. L. REV. 262, 267 (1934).

33. *Shepherd v. Pybus*, 3 M. & G. 868, 133 Eng. Rep. 1390 (1842); Williston, *Representations and Warranty in Sales* — *Heilburt v. Bukleton*, 27 HARV. L. REV. 1, 11 (1913).

The notion of an "implied" warranty is a constant reminder of one of the origins of responsibility for quality: the *express* warranty. 2 RABEL 104.

34. LLEWELLYN, *op. cit. supra* note 29, at 272; Corman, *Implied Sales Warranty of Fitness for Particular Purpose*, 1958 WIS. L. REV. 219.

35. *Jones v. Bright*, 5 Bing. 533, 130 Eng. Rep. 1167 (1829) (Best, C.J.), a case on the borderline between express and implied warranty.

In the present case the copper was sold for the purpose of sheathing a ship, and was not fit for that purpose: the verdict for the Plaintiff, therefore, must stand: the case is of great importance; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold.

Id. at 546, 130 Eng. Rep. at 1173.

Judging by their language, some of the early cases appear to be indebted to Pothier who popularized the famous maxim: *Unusquisque peritus esse debet artis suae* (*infra* note

fitness in terms both of the function of the commodity itself and of the buyer's business. But the development of this warranty was greatly retarded by the stubborn survival of *caveat emptor* in sales involving "known, definite and described" articles.³⁶ In such sales, even where the seller was aware of the buyer's purpose, the latter frequently remained unprotected unless he had relied on the seller's skill or judgment. Dealers during the 19th century, particularly in this country,³⁷ greatly profited by this limitation. The "known, definite and described" articles exception to warranty of fitness, greatly strengthened by a rigid application of the parol evidence rule,³⁸ has been dying very slowly.³⁹ Its traces are still visible to this day in the requirement of all three major sales codes that in order to be protected the buyer must have relied on the seller's skill and judgment in selecting or furnishing goods suitable for any particular purpose of which the seller had reason to know.⁴⁰

In the light of these developments the frequent statements in common law cases of the last century emphasizing a fundamental cleavage between civil and common law are no longer accurate.⁴¹ Behind the bewildering and frequently conflicting technical details, a tendency towards convergence in the treatment of latent defects of quality⁴² is clearly visible. Both civil and com-

74). *E.g.*, *Hoe v. Sanborn*, 21 N.Y. 552, 562 (1860). This famous case shows, however, the reluctance of the case law to invoke the implied warranty against manufacturers who obtained their raw material from a respectable supplier and were unaware of its defects.

36. *Corman*, *supra* note 34, at 224-26. *Jones v. Just*, L.R. 3 Q.B. 197 (1868); *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U.S. 510 (1891). *LLEWELLYN*, *op. cit. supra* note 29, at 272; *Prosser*, *supra* note 32, at 133.

37. *Corman*, *supra* note 34, at 232.

38. *E.g.*, *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U.S. 510 (1891); *Morris v. Bradley Fertilizer Co.*, 64 Fed. 55 (3d Cir. 1894).

39. 2 *MECHEM*, *THE LAW OF SALE OF PERSONAL PROPERTY* § 1349 (1901). To get unstuck courts tended to expand either the notion of merchantability or of sale by description. As a result of this development the two warranties frequently, though not always, amount to the same thing. *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931); 1 *WILLISTON*, *SALES* § 235 (rev. ed. 1948).

40. The Sales of Goods Act, 1894, 56 & 57 Vic. c. 71 [hereinafter cited as SGA] § 14(1); USA § 15(1); UCC § 2-315. The UCC has, however, abolished an outgrowth of this rule, the patent and trademark exception, provided for in USA § 15(4). See UCC § 2-315, Comment 5. This exception was inapplicable to the warranty of merchantability, 1 *WILLISTON*, *SALES* § 236a (rev. ed. 1948) and its elimination was foreshadowed by the development of the case law. For a criticism of the English statute, see COMMITTEE ON CONSUMER PROTECTION, FINAL REPORT nos. 440 (merchantability), 447-50 (fitness for purpose) (presented to Parliament by the President of the Board of Trade, Cmnd. 1781, 1962).

41. *Hoe v. Sanborn*, 21 N.Y. 552 (1860).

42. In principle, civil and common law agree in limiting the protection of the buyer to latent "hidden" defects. Of course, there are variations as to the meaning of the term even among civil law countries. German law, for instance, goes further than French law in protecting the buyer against patent defects. The former imposes on the buyer only a limited "duty" of inspection and protects him so long as his ignorance of a defect is not grossly negligent. GERMAN CIVIL CODE § 460. See FRENCH CODE CIVIL art. 1642. The impact of the German rule, however, is modified by counter rules: a buyer who knowingly

mon law put express warranties at the disposal of the buyer. Broadly speaking their chief function today is to enable the parties to tailor the sales contract to their individual needs,⁴³ particularly to expand the seller's obligation so as to include qualities not covered by statutory or common-law implied warranties.⁴⁴ Their function and prerequisites thus reflect the basic structure of the individual sales laws.⁴⁵ In according protection to the buyer who has

and without reservation accepts nonconforming delivery loses his remedies. GERMAN CIVIL CODE § 464. For the availability of waiver and estoppel against a buyer who learns about defects after acceptance, but pays without protest, see 2 SOERGEL-SIEBERT, *op. cit. supra* note 12, at § 464, Anm. 5. In sales between merchants under German law, the purchaser's duty to examine the goods and to notify the seller of a defect is of great practical importance. GERMAN COMMERCIAL CODE §§ 377-78. Under article 201 of the Swiss Code of Obligations, the duty to notify extends to all sales. Also see FRENCH CODE CIVIL art. 1648.

43. In the language of Comment 1 to UCC § 2-313, express warranties "rest on the 'dickered' aspects of the individual bargain." The requirement that an express warranty must be part of the bargain [UCC § 2-313(1)(a)] is not a peculiarity of Anglo-American law. For the German law, see *S. Sch. v. L.*, Reichsgericht (V. Zivilsenat), April 1, 1903, 54 R.G.Z. 219, 223; *S. Witwe H. v. Z.*, Reichsgericht (V. Zivilsenat), October 5, 1939, 161 R.G.Z. 330, 337; and for the French law, see 2 JOSSERAND, *COURS DE DROIT CIVIL POSITIF FRANÇAIS* no. 533 (1930). But for the Swiss law, see *Octo S.A. v. Spiegl & Waber G. m. b. H.*, Bundesgericht (II. Zivilrecht), September 25, 1945, 71 Entscheidungen des Schweizerische Bundesgerichtes 239 (Switz.).

Under the civil law assurances as to quality made subsequent to the contract will be treated like other express warranties; the contrary rule of the common law resulting from the consideration doctrine [*Roscola v. Thomas*, 3 Q.B. 234 (1942); *Smith v. Fisher Plastics Corp.*, 76 F. Supp. 641 (D.C. Mass. 1948)] has been abandoned by the UCC § 2-209, § 2-313, Comment 7.

44. Economic characteristics and satisfactory performance under special circumstances furnish illustrations. See, e.g., *The E. 270*, 16 F.2d 1005 (D. Mass. 1927), illustrating the difficulties in applying the implied warranty of fitness; 10 PLANIOL ET RIPERT, *op. cit. supra* note 20, at no. 140 ("engagement d'assurer le bon fonctionnement de la chose vendue"); GERMAN CIVIL CODE §§ 459(2), 480 (expressly differentiating between defect and absence of a promised quality giving the latter a wider meaning); 2(2) STAUDINGER, *KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH* § 459 (11th ed. 1955).

45. Closely related to the "dickered aspect" of express warranties is their impact on exclusion or modification clauses. UCC § 2-313, Comment 4; § 2-316, Comment 1. Express warranties, furthermore, are means of expanding damage liability. This is most important for legal systems like the German which limit the buyer's remedies in the absence of fraud. An express warranty, finally, may limit *caveat emptor* and protect the buyer who might have discovered the defect by using ordinary diligence or by acceding to the request to inspect. SWISS CODE OF OBLIGATIONS art. 200; UCC § 2-316(1), Comment 8; the GERMAN CIVIL CODE goes further in protecting the buyer, § 460.

The importance of express warranties makes necessary a differentiation between implied in law warranties on the one hand and "puffing" on the other. The development of a workable concept of "express warranties" has caused much difficulty in those legal systems which require neither formal words nor a specific intention. The penetrating criticism of the express warranty concept by FLUME, *EIGENSCHAFTSIRRTUM UND KAUF* 76 (1948) and von Caemmerer, *Falschliefung*, in *FESTSCHRIFT FÜR MARTIN WOLFF* 18 (1952), is not only valid for the German law. Abolition of the express warranty concept should be

not secured an express warranty from a non-fraudulent seller, civil and common law, although applying different techniques,⁴⁶ have worked out a dual test of responsibility for quality. The goods sold must be fit for the ordinary purpose for which such goods are used and, in addition, they must be fit for the particular purpose envisaged by the buyer.

Still, the dual test of defect adopted by the civil codes seems to give the buyer a broader protection than its common law counterpart, the catalogue of implied warranties. Under both legal systems the seller's responsibility to provide goods of a quality sufficient to meet the particular purpose of the buyer presupposes that fitness for the particular purpose has become part of the agreement,⁴⁷ but under the civil law, the seller's responsibility is not predicated on the buyer's reliance upon the seller's skill or judgment.⁴⁸ Still, our case law has shown a remarkable tendency towards an expansive interpretation of fitness for purpose.⁴⁹ Our implied warranty of merchantability, on the other hand, has remained a dealer's warranty.⁵⁰ This limitation primarily affects the buyer from a nonprofessional; he is not accorded protection against latent defects impairing the ordinary use of the commodity.⁵¹ This gap in the non-professional seller's responsibility for quality has been narrowed by a broadening of the category of sales by description. Expansive as the category of sale by description is, however, its domain does not reach far enough to make every sale a sale by description, thereby protecting every buyer of specific goods

seriously considered. This would require adoption of a wide and elastic concept of "defect," preferably of "nonconforming delivery," an expansion of the damage remedy and a different approach to exculpation clauses, which should not protect a fraudulent seller or one who uses a contract of adhesion. The *UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS* (text accompanying note 112 *infra*) has moved in the right direction on this score. See arts. 33, 36, 38, 39, 41-46, 82, 84-87.

As far as "puffing" is concerned the common law seems to give more leeway for seller's talk. See 2 *RABEL* 143; UCC § 2-313(2). *But see* Foote v. Wilson, 104 Kan. 191, 178 Pac. 430 (1919); 2 *RABEL* 143.

46. For a criticism of the technique of the UCC in working out a detailed catalogue clarifying "merchantability" see HONNOLD, *CASES ON SALES AND SALES FINANCING* 74-75 (2d ed. 1962).

The *UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS* art. 33, adopted by the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, April 1964, is strongly influenced by the drafting technique used in SGA, USA and UCC. For the text of article 33, see text accompanying note 113 *infra*.

47. See notes 12, 35 *supra* and accompanying text.

48. 2 *RABEL* 167.

49. *Martin v. J. C. Penney Co.*, 50 Wash. 2d 560, 313 P.2d 689 (1957); *Kurris v. Conrad & Co.*, 312 Mass. 670, 46 N.E.2d 12 (1942).

50. UCC § 2-314(1); SGA § 14(2); Prosser, *supra* note 32, at 121.

51. *ATTYAH, THE SALE OF GOODS* 63-64 (1957); 2 *RABEL* at 172. The buyer from a professional, however, is protected. *Grant v. Australian Knitting Mills*, [1936] A.C. 85, 100; *but see* *Phares v. Scandia Lumber Co.*, 62 N. Mex. 90, 305 P.2d 367 (1956). Also see HONNOLD, *op. cit. supra* note 46, at 79-83; Ruud, *The Vendor's Responsibility for Quality in the Automated Retail Sale*, 9 KAN. L. REV. 139 (1960).

against latent defects.⁵² The drafters of the Uniform Commercial Code, in their attempt to increase the buyer's protection, have opened the way to an expansion of the warranty of merchantability in favor of a buyer who relies on the seller's general statement that the goods are "guaranteed." The code provides that its provisions dealing with merchantability may furnish a guide to the content of the express warranty resulting from the statement of guarantee by any seller even if he is not a "merchant" as to the goods in question.⁵³

In sum, it is by no means certain that, as a practical matter, the differences between civil and common law are as great as they are thought to be. The standards which measure the seller's responsibility under either system are flexible enough to give courts a considerable amount of leeway in adjusting warranty law to the needs of the individual situation.⁵⁴

2. *Damages: Strict vs. Fault Liability*

In spite of these similarities there remains, we are told, a fundamental difference between the common and the civil law of defects. Under civil law the warrantor must respond in damages only if he was fraudulent or negligent. Under common law, however, the seller, as a rule, is strictly liable for damages when he breaks either an express or implied warranty; negligence is not a prerequisite of the seller's liability.⁵⁵ Though the rule is known as the "English

52. *Varley v. Whipp*, [1900] 1 Q.B. 513, 516, extends the protection of the buyer who "has not seen the goods, but is relying on the description alone"; 1 WILLISTON, SALES §§ 205, 224 (rev. ed. 1948). *Smith v. Zimbalist*, 2 Cal. App. 2d 324, 38 P.2d 170 (1934), goes even further, but the warranty rationale advanced in that case is justifiably criticized in HONNOLD, *op. cit. supra* note 46, at 45.

53. UCC § 2-314, Comment 4. To increase the protection of the buyer still further, Comment 3 suggests a *culpa in contrahendo* liability. The seller's knowledge of . . . any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the provisions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

For a discussion of *culpa in contrahendo*, see Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

54. The lack of a detailed catalogue of implied warranties has made it easier for civil law courts to apply a flexible standard. For a criticism of the technique used by Anglo-American codifiers, see HONNOLD, CASES ON SALES AND SALES FINANCING 67 (2d ed. 1962); Honnold, *A Uniform Law for International Sales*, 107 U. PA. L. REV. 299 (1959). "It is perhaps ironic," Professor Honnold states, "that English case-law at one point came close to reaching the simplicity and the flexibility needed for handling sales contracts when in 1877 Judge Brett wrote that there is one rule which 'comprises all the others': the goods must answer 'the real mercantile or business description' which is 'contained in words in the contract, or which would be so contained if the contract were accurately drawn out.' But the law became complicated as judges, in the course of distinguishing unwanted precedents, created separate types of implied warranty surrounded by technical and artificial rules. Codifiers conscientiously trying to preserve rather than to reform perpetuated these technicalities." *Id.* at 313.

55. In *Randall v. Newson*, [1877] 2 Q.B. 102 (C.A.), the question was squarely raised whether the undertaking of the seller under an implied warranty of fitness was absolute

rule," most American courts follow it as well either as a common law principle or as it is incorporated in the Uniform Sales Act.⁶⁰ Williston's defense of the rule lays out the standard arguments:

The English rule may seem somewhat harsh at first sight, but on grounds of policy it is probably superior to any modification of it based upon negligence. If the buyer is compelled to contest the question of negligence with the seller, he will find it very difficult to recover. In the nature of the case the evidence will be chiefly in the control of the seller, and the expense of even endeavoring to make out a case of this sort will be prohibitive in cases involving small amounts.⁶⁷

The civil law, by contrast, is still influenced by the principle that damage liability, as a rule, presupposes fault, *i.e.*, at least negligence.⁶⁸ The *aedilician*

or limited to skill and care in discovering a defect. Treating the implied warranty as a contractual undertaking, Brett, J., adopted the former alternative; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608 (C.A.); *Rodgers v. Niles*, 11 Ohio St. 48 (1860); 1 WILLISTON, SALES §§ 237, 237a (rev. ed. 1948).

56. 1 WILLISTON, SALES § 237 (rev. ed. 1948). Williston has weakened his policy arguments by his praise of the civil law solution which he regards as "intrinsically meritorious", but "so opposed to all common law authorities that it can hardly be regarded as a possibility." See also Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124-34 (1960).

57. 1 WILLISTON, SALES § 237a (rev. ed. 1948).

Williston is quite explicit in maintaining that his policy arguments in favor of strict liability apply to all sellers and that no distinction should be made between manufacturers and dealers. He continues:

Moreover, if the buyer cannot recover from the seller he cannot recover from anyone for the defective character of the goods which he has bought. The wrong done by the sale of defective materials to the manufacturer who later sold the goods cannot form the basis of action by the ultimate buyer. Consequently, the real wrongdoer who has caused the ultimate injury escapes. On the other hand, if the manufacturer is held to an absolute liability irrespective of negligence, it will unquestionably increase the degree of care which he will use, and if in any case he is compelled to pay damages for breach of warranty where the real cause of the defect was inferior material which he himself innocently purchased, he will have a remedy over against the persons who sold him this inferior material, and his damages will include whatever he himself has had to pay for breach of warranty. Thus the loss will be borne ultimately by the person who should be responsible.

Ibid.

The absolute liability of the immediate seller is thus linked with the difficulties in reaching the manufacturer in contract because of the privity requirement, an argument that has lost much of its force due to the evolution of tort law. This argument will be discussed in Part II of the article.

The absolute liability of the dealer has often been regarded as unfair to the innocent dealer, particularly if the merchandise was sold in a sealed container, making it impossible for the dealer to inspect it. 1 WILLISTON, SALES § 242 (rev. ed. 1948).

58. GERMAN CIVIL CODE §§ 275-76, 463. FRENCH CODE CIVIL arts. 1147, 1645, 1646.

The warranty liability of the seller under the common law is one of the most striking instances of the principle of "absolute" liability which, we are often told, is a characteristic feature of the common law of contracts. In reality, the differences between the two systems are not as great as they appear to be. German law, for instance, which has codified the fault principle, has softened its impact by placing on the buyer the risk of ultimate per-

law is exceptional in that it reaches the seller who is not at fault, but, at least in its original form, this law provides only for rescission of the sale or reduction of price and not for full damages.⁵⁹ But here again the gap has continuously been narrowed and may nearly be closed.

German law is still farthest from the common law, but even in Germany the position taken by the civil code has suffered modification. Under the German Civil Code, as was pointed out earlier, the buyer, in the absence of fraud or express warranties, is entitled only to the aedilician remedies.⁶⁰ Because of social pressure, the German courts have increasingly expanded the range of the damage remedy. They have enlarged the concept of fraud by extending the provision in the civil code imposing full damage liability in the case of fraudulent concealment, to cover the analogous situation of fraudulent misrepresentation of quality.⁶¹ Cautiously, they have introduced the notion of a warranty implied in fact, the breach of which makes the seller liable for full damages. Finally, in appropriate circumstances they have modified the scheme of the Civil Code by subjecting the negligent as well as the fraudulent seller to full damage liability.

The expansion of the concept of fraud is of less significance than the introduction of the concept of a warranty implied in fact. The Reichsgericht occasionally has been willing to imply a warranty if the buyer has communicated to the seller that the commodity sold must be fit for a particular purpose and an intention to warrant can be found in the surrounding circumstances.⁶²

suasion that nonperformance was excusable. GERMAN CIVIL CODE §§ 282, 285. Also, the fault principle does not apply to breaches of contract involving objects of a general class, as opposed to a specific object. *Id.* at § 279 (FRENCH CODE CIVIL art. 1245). The common law, on the other hand, has increasingly reduced the domain of absolute liability by enlarging the categories of excusable impossibility and frustration. *E.g.*, *Taylor v. Caldwell*, 3 B. & S. 826, 122 Eng. Rep. 309 (1863); *Joseph Constantine S.S. Line v. Imperial Smelting Corp.*, [1942] A.C. 154; RESTATEMENT, CONTRACTS § 457 (1932); 6 CORDIN, CONTRACTS §§ 1328-29 (1962 ed.); Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94 (1953). For a general discussion, see VON MEHREN, *THE CIVIL LAW SYSTEM* 684-86 (1957); 1 RABEL 329-45.

59. 2 RABEL 254-55.

60. The liability of the seller for the expectation interest, provided for in GERMAN CIVIL CODE § 463, presupposes that the lack of quality of the defect was already in existence at the time the contract was entered into and was not cured at the time the risk passes, 2 SOERGEL-SIEBERT, *op. cit. supra* note 12, at § 463 Anm. 1. By contrast, the aedilician remedies are predicated on the existence of defects at the time the risk passes. GERMAN CIVIL CODE § 459. Under German law the risk of accidental destruction or deterioration passes, as a rule, with delivery (§ 446), or if goods are to be shipped (to a place other than the place of performance) with delivery to the person designated to carry out the shipment (§ 447). *Cf.* UCC § 2-509.

61. The case law is collected in 2 DAS BÜRGERLICHE GESETZBUCH, KOMMENTAR UND BUNDESRICHTERN (11th ed. 1959) [hereinafter cited as B.G.B.-R.G.R.K.] § 463 Anm. 6. The misrepresentation need not amount to a contractual warranty. 2 SOERGEL-SIEBERT, *op. cit. supra* note 12, § 463 Anm. 9.

62. Enneccerus-Lehmann, *supra* note 20, at § 108, II, 1b; SOERGEL-SIEBERT, *op. cit. supra* note 12, at § 459 Anm. 28.

But this expansion of the warranty category seems to have been confined generally to the sale of seed grain.⁶³

Case law of considerable practical importance has also supplemented warranty liability by allowing in a sales context the breach of contract remedies available to a creditor against a debtor guilty of faulty performance.⁶⁴ But these attempts of the case law to "improve" on the warranty law of the civil code have not been carried through to their logical conclusion. Until the risk has passed, the buyer, according to the Reichsgericht, is entitled to reject defective goods and to invoke the general provisions of the Civil Code for breach of contract, including those provisions providing for full damage liability.⁶⁵ Once the risk has passed, however, the special warranty provisions embodied in the Code are said to take precedence.⁶⁶ But this distinction has not been carried out consistently. After the risk has passed, recovery of damages against a seller at fault has been denied by the Reichsgericht to the buyer if defective delivery has caused only a mercantile loss (*e.g.*, the usefulness of the commodity was impaired). But even after the risk has passed, the seller has been liable for the damages caused to the buyer's property or person by the use of defective goods (*e.g.*, meat spoiled in a refrigerator which was not working properly, or a diseased animal infected the buyer's flock).⁶⁷

63. Reichsgericht, Oct. 25, 1921, 103 R.G.Z. 77; see further, S. Eheleute L. v. S. Reichsgericht (II. Zivilsenat), Nov. 22, 1932, 138 R.G.Z. 354, 357. The reticence of the Reichsgericht is quite understandable. A free use of the notion of warranty "implied in fact" would substantially change German sales law which limits the remedies of the buyer against the innocent seller to rescission and price diminution. S.B. v. F., Reichsgericht (II. Zivilsenat), July 6, 1926, 114 R.G.Z. 239, 241; S. Witwe H. v. Z., Reichsgericht (V. Zivilsenat), Oct. 5, 1939, 161 R.G.Z. 330, 336-37.

64. The German Civil Code deals expressly with only two categories of nonperformance: impossibility and delay in performance (*Verzug*). To close the gap German case law has created the category of faulty performance (*positive Vertragsverletzung*, often called *Forderungsverletzung*). VON MEHREN, *op. cit. supra* note 58, at 684-86 (collecting authorities and literature); 2 RABEL 257. To be liable for *positive Vertragsverletzung* the debtor must be at fault. 2 ENNECCERUS-LEHMANN, *supra* note 20, § 55, II.

65. 2 B.G.B.-R.G.R.K. § 459 Anm. 33.

If the buyer refuses to accept the goods, the seller has to prove conformity; the buyer, on the other hand, who claims rescission (*Wandlung*) after acceptance has to prove defectiveness. V. v. R., Reichsgericht (I. Zivilsenat.), Dec. 10, 1924, 109 R.G.Z. 295, 296.

This reading of the law has enabled the Reichsgericht to say that the buyer who rejects goods which do not measure up to an express warranty has an option either to accept and claim damages caused by the defect or reject the goods and claim his full expectation interest. L. & V. v. M., Reichsgericht (II. Zivilsenat), June 19, 1917, 90 R.G.Z. 332. Most of the literature wants to limit recovery to the damages caused by the defect. 2 STAUDINGER, *op. cit. supra* note 44, at § 463 Anm. 19.

66. Literature and case law on this point are collected in 2 ENNECCERUS-LEHMANN, *supra* note 20, at § 112; SOERGEL-SIEBERT, *op. cit. supra* note 12, at § 459 Vorbem. 15; 2 B.G.B.-R.G.R.K. § 459 Anm. 39.

67. S. Greve v. Lefeldt & Lentsch, Braunschweig Oberlandesgericht (II. Zivilsenat), June 20, 1911, 67 Seuffert's Archiv 7 (spoiled meat); 2 STAUDINGER, *op. cit. supra* note 44, § 459 Vorbem. 18 (tracing the diseased animal case from its origins in Digest 19.1.13). See S. Gerling-Konzern v. Machsfabr. G., Reichsgericht (VII. Zivilsenat), Dec. 18, 1942,

Liability, further, has been confined to situations in which the damage has resulted from something the seller negligently did in performing the sales contract. The Reichsgericht was unwilling to hold the seller liable for damages caused by defects which, although existing at the time of the sale, he negligently failed to communicate to the buyer.⁶⁸ This denial of *culpa in contrahendo* liability was based on an *argumentum e contrario*: Since section 463 of the Civil Code provides for damages in the case of fraudulent non-disclosure, the legislature must have intended to exclude negligent nondisclosure. This reasoning, however, overlooks the fact that section 463 deals with recovery of expectation damages.⁶⁹ A recent decision of Bundesgerichtshof seems to have moved away from the traditional interpretation of section 463, permitting recovery of damages in the case of gross negligence.⁷⁰ Thus, though the German law has expanded liability for fraud and negligence, it has not, in the absence of a warranty, either expressed or implied in fact, abandoned the fault principle.⁷¹ Despite these "advances," therefore, the German law is still quite far from the common law in the treatment of warrant liability.

Other civil law countries do not share the attitude of the Germans. Code provisions and cases have taken a more liberal view of the damage remedy. The buyer who is entitled to rescission is entitled to be restored to the status quo. If the seller was innocent, liability is limited, however, to the "expenses incurred in connection with the sale."⁷² On the other hand, if the seller knew

170 R.G.Z. 246, 251 (another spoiled meat case). Cf. S. Witwe H. v. Z., Reichsgericht (V. Zivilsenat), Oct. 5, 1939, 161 R.G.Z. 330, 337; S.H.E.M. Comp. m.b.H. v. B.u.a., Reichsgericht (II. Zivilsenat), Jan. 17, 1940, 163 R.G.Z. 21, 32 [same fact situation as General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960)]; 2 Enneccerus-Lehmann, *supra* note 20, at § 112, I, 3; 2 B.G.B.-R.G.R.K. § 459 Anm. 39; 2 RABEL 254-57.

To justify the distinction it has been argued that special sales law was meant to cover only the "direct," but not the "indirect" consequences of defective delivery. Since recovery presupposes fault, *i.e.*, at least negligence, a seller-dealer who has complied with the standards of customary inspection may escape liability. Bundesgerichtshof, March 15, 1956, Juristische Rundschau fuer Versicherungsrecht, 1956, 259. For a discussion of the burden of proof (risk of ultimate persuasion), see SOERGEL-SIEBERT, *op. cit. supra* note 12, at § 275 Vorbem. 41 *et seq.*

68. *E.g.*, S.R. v. Firma Sch. & Co., Reichsgericht (II. Zivilsenat), March 11, 1932, 135 R.G.Z. 339, 346. Tort law, however, may serve as a corrective. See S.H.E.M. Comp. m.b.H. v. B.u.a., Reichsgericht (II. Zivilsenat), Jan. 17, 1940, 163 R.G.Z. 21, 33-35; 2 SOERGEL-SIEBERT, *op. cit. supra* note 12, § 463 Anm. 5.

This position has frequently been criticized in the legal literature, which advocates protection of the reliance interest; some legal writers even favor protection of the expectation interest. 2 RABEL 256; 2 B.G.B.-R.G.R.K., § 459.

69. Enneccerus-Lehmann, *supra* note 20, at § 112, I, 3.

70. LINDENMAIER-MOEHRING, NACHSCHLAGEWERK § 463.

71. The liability for the expectation interest for breach of an express warranty does not presuppose fault. B.G.B.-R.G.R.K., § 463 Anm. 2.

72. "*Les frais occasionnés par la vente.*" FRENCH CODE CIVIL art. 1646. French case law has shown a remarkable tendency to give this famous phrase a most extensive meaning, without including, however, lost profits. Morrow, *supra* note 12, at 537-43. See SWISS CODE OF OBLIGATIONS art. 208 (recovery of damages "directly caused"); 5(2) OSER-

about a hidden defect, this limitation is not applicable.⁷³ The case law, particularly French law, under the influence of Pothier, has greatly expanded the seller's liability for hidden defects, by including a seller who did not know, but should have known — using a famous maxim, "*unusquisque peritus esse debet artis suae*."⁷⁴ To increase the protection of buyers, the case law has created an irrebuttable presumption that a professional seller is aware of hidden defects in the goods he trades in.⁷⁵ Thus, the manufacturer of a car or of a gun is liable in contract to the buyer for faulty construction, and must reimburse his buyer even for damages the latter has to pay to an injured third party.⁷⁶

The Uniform Law on the International Sale of Goods has completed this evolutionary process by granting to the disappointed buyer recovery in damages in addition to the aedilician remedies and specific performance.⁷⁷

3. *The Characterization of Warranty Liability*

A substantial body of literature has consistently attempted to rationalize the seller's responsibility for quality in terms of the express or implied intention of the parties.⁷⁸ This rationalization is found in the common law litera-

SCHOENENBERGER, KOMMENTAR ZUM SCHWEIZERISCHEN CIVILGESETZBUCH art. 208 Anm. 5 (2d ed. 1936).

73. FRENCH CODE CIVIL art. 1645 (this section has been expanded to include not only knowledge but also (grossly?) negligent lack of knowledge); SWISS CODE OF OBLIGATIONS art. 208 (seller liable unless "fault may in no wise be imputed to him."); ALLGEMEINES BUERGERLICHES GESETZBUCH art. 932 (Austria 26th ed. Kapfer 1960) [hereinafter cited as AUSTRIAN CIVIL CODE]; EHRENZWEIG, SYSTEM DES OESTERREICHISCHEN ALLGEMEINEN GESETZBUCHS § 323, 4 (2d ed. 1928).

74. 10 PLANIOL & RIPERT, *op. cit. supra* note 20, no. 134; POTHIER, TRAITÉ DU CONTRAT DE VENTE no. 213 (1848). Mazeaud, *supra* note 14, at 611-18, points out that the case law is subject to different interpretation and cannot always be reconciled. For his summary of the case law, see *id.* at 618.

75. Wallut v. Rouzeand, Cour de Cassation (ch. req., sect. comm.), May 10, 1909, [1912] Dalloz Jurisprudence [hereinafter cited as D.] I. 16 (Fr.) (dealer). 10 PLANIOL & RIPERT, *op. cit. supra* note 20, at no. 134 (collecting authorities).

76. Soc. des Automobiles Rolland-Pillain v. Berchet, Cour de Cassation (ch. req., sect. comm.), [1925] Sirey Recueil General [hereinafter cited as S.] I. 193, [1926] D. I. 9 (Fr.) (with note by Jossierand); Soc. Piot-Lepage v. Cahnottes, Cour de Cassation (ch. req., sect. comm.), [1938] Dalloz Recueil Hebdomadaire [hereinafter cited as D.H.] 53 (Fr.); Mazeaud, *supra* note 14, at 615-17; Morrow, *supra* note 12, at 542-43; 2 RABEL 255-56. These cases seem to make it unnecessary for the injured buyer to resort to tort law to be made whole. Morrow, *supra* at 538-39, 542. But see Usines Y. v. X., Cour de Cassation (ch. req., sect. comm.), [1937] D.H. 217. Mazeaud, *supra*, at 617-18.

77. Art. 41, 82, 84-87; 2 RABEL 267-70. Articles 82 and 86 limit the recovery of damages by laying down a foreseeability test.

78. The German literature is particularly copious. *E.g.*, SUESS, WESEN UND RECHTSGRUND DER GEWAHRLEISTUNG FUER SACHMAENDEL (1931); FLUME, *op. cit. supra* note 12; 2 LARENZ, LEHRBUCH DES SCHULDRECHTS § 37 (6th ed. 1964); 2 SOERGEL-SIEBERT, *op. cit. supra* note 12, at § 459 Vorb. 9-35. For the common law see 1 WILLISTON, *op. cit. supra* note 55, at § 197; Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376, 383-85 (1920); Note, *Warranties of Kind and Quality under the Uniform Revised Sales Act*, 57 YALE L.J. 1389, 1395 (1948).

ture, but it is not altogether foreign to civilian thinking. Express warranties fit most neatly into the theory since they truly represent the "dickered" aspects of a sales contract.⁷⁹ But even implied warranties are contractual at their core since they rest on the presumed intention of the parties and are subject to being displaced by valid disclaimer. Implied warranties, in the language of Section 2-313, Comment 1, of the Uniform Commercial Code, "rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated."⁸⁰

Modern sales law, in its desire to protect the buyer and his expectations as to quality, is adopting the position that the seller is responsible for the qualities which the buyer is entitled to expect in the light of all surrounding circumstances, including the purchase price.⁸¹ This development honors the principle of *bona fides* which permeates the whole modern law of contracts and has brought sales law quite close to adopting the maxim rejected by Lord Mansfield that a sound price warrants a sound commodity.⁸² Indeed, the conviction is gaining ground that the function of warranty law is to establish a "subjective" equivalence between price and quality.⁸³

In implementing the contractual theory of warranty liability courts and legislatures have puzzled whether non-compliance with warranty obligation should be treated as any other breach of contract or as a special kind of breach. Partly for reasons of historical continuity but mainly for reasons of expediency, most sales laws have chosen the latter alternative. The main, though not the only, purpose of the special warranty rules is to make sure that reclamations based on lack of quality are speedily made, administered and adjudged. To accomplish this end many sales laws have provisions imposing

79. UCC § 2-313, Comment 1; according to 1 WILLISTON, SALES § 197 (rev. ed. 1948), not even express warranties can be fitted into the contractual scheme of things. The elements of express warranties by affirmation which bind the seller without an "actual agreement to contract" are broader, he claims, than those of a contract. This reasoning, reflecting a voluntaristic theory of contracts usually attributed to Civilians, is strange indeed coming from the defender of the objective theory of contracts. According to Williston, warranty liability "may be called on obligation either on a *quasi*-contract, or a *quasi*-tort, because remedies appropriate to contract and also to tort have been applicable." Williston overlooks the fact that "Anglo-American law, with its consensual-relational duties, its feudal survivals and its original tort theory of contract, can stretch its conception of consensual obligation pretty far." Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731, 743 (1943).

80. See also UCC § 2-313, Comment 4: "... the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell. . . ."

81. Costigan, *supra* note 78, at 383; UCC § 1-203; Note, *Warranties of Kind and Quality under the Uniform Revised Sales Act*, 57 YALE L.J. 1389, 1393 (1948).

82. See *supra* note 26.

83. UCC § 2-313, Comment 4. In our law the question has often come up in connection with the extent of liability under the implied warranty of merchantability. Mathieu v. George A. Moore & Co., 4 F.2d 251 (N.D. Cal. 1925); Prosser, *supra* note 32, at 137-39; 2 RABEL 131-32.

on the buyer a "duty" to inspect at the earliest possible opportunity and to notify the seller with reasonable promptness.⁸⁴ Short statutes of limitations serve the same purpose.⁸⁵

The evolution of a special warranty law has raised the questions of whether it should displace altogether the provisions of the general law of contracts⁸⁶ (and for that matter of torts) in the area and whether its application should be limited to quality defects or should be extended so as to give uniform treatment to all cases of non-conforming delivery.

The answer to the first question should depend, of course, on the degree to which the newly developed warranty law has been able to give satisfactory service. Unfortunately, this approach has not always been followed: Germany, for example, has neither succeeded in developing a completely adequate warranty law nor has she been able to fill the inadequacies by applying the general law of contracts or of torts. The reluctance to supplement the statutory scheme of warranty remedies by judicially adding contract remedies was caused in large measure by a doctrinal prejudice: the seller, the argument runs, who delivers a specific commodity has performed the contract even though the commodity is defective; he is therefore not guilty of a breach of contract, and he must answer only under the special rules of warranty law.⁸⁷ Though the courts have never rigidly adhered to this dogma, its force has still been strong enough to prevent the German sales law from falling in line with the law of other civil

84. USA §§ 47-49; UCC §§ 2-605, 2-606, 2-607, 2-608. In addition, the buyer must exercise his right of rejection within a seasonable time after delivery or tender and give a reasonable notice of rejection. UCC § 2-602. See GERMAN CIVIL CODE § 464 (acceptance of goods with knowledge of defects, reservation of rights necessary); GERMAN COMMERCIAL CODE § 377.

85. GERMAN CIVIL CODE § 477 (six months unless fraudulent concealment); FRENCH CODE CIVIL art. 1648 (within a short time).

86. The troublesome relationship between warranty on the one hand and mistake and misrepresentation on the other will not be discussed in detail. Since in many legal systems the areas covered by these institutions are contiguous if they do not overlap, disappointed buyers, anxious to recover or avoid payment of the purchase price frequently have tried to better their position by resorting to the often more liberal law of mistake or misrepresentation where a warranty claim was either not given or lost because of noncompliance with warranty law. *Smith v. Zimbalist*, 2 Cal. App. 2d 324, 38 P.2d 170 (1934); *Cotter v. Luckie*, [1918] N.Z.L.R. 811.

It makes good sense to say that, in the absence of fraud, a buyer who has forfeited his warranty claim should not be permitted to invoke the law of mistake to repair his plight. 2 LARENZ, *op. cit. supra* note 78, at 56 (German law); *e.g.*, *Leaf v. International Galleries*, [1950] 1 All E.R. 693 (A.C.), discussed in Note, 13 Mod. L. Rev. 362 (1950); *Donavan v. Aeolian Co.*, 270 N.Y. 267, 200 N.E. 815 (1936).

For a discussion of Anglo-American law see HONNOLD, *op. cit. supra* note 46, at 45-47; *Stoljar, Conditions, Warranties and Descriptions of Quality in the Sale of Goods — II*, 16 Mod. L. Rev. 174, 190-94; German law: FLUME, *op. cit. supra* note 12; 2 LARENZ, *op. cit. supra* note 78, at 56-57; French law: 1 GUILLOUARD, *TRAITÉS DE LA VENTE ET DE L'ÉCHANGE* no. 420 (1889); 10 PLANIOL & RIPERT, *op. cit. supra* note 20, at 126.

87. SUESS, *op. cit. supra* note 78, at 49. The same position has been taken for the Anglo-American law in WAITE, *THE LAW OF SALES* 224 (2d ed. 1938).

law countries. To abolish the more complicated and confusing interrelationship between warranty remedies and general remedies for breach of contract, and the attendant endless theoretical speculations, some writers have advocated that the aedilician remedies have outlived their usefulness and that the aedilician law be merged into the general law of contracts — that a breach of warranty be treated as an ordinary case of nonperformance.⁸⁸

Tort Law. The adequacy of sales law controls the use of tort law, since the need for resorting to tort law depends on the extent of protection accorded a disappointed buyer by sales law. The wide protection available to the buyer in the form of express or implied warranties and their counterparts in the civil law has correspondingly reduced the usefulness of the tort remedy, especially when the case arises between the buyer and his immediate seller.⁸⁹ Even between the immediate parties to a sale, however, tort law still has its advantages.⁹⁰

Common law courts, for example, have historically emphasized the mixed nature of warranty liability to give the buyer the benefit of tort law.⁹¹ Under the provisions of the Sales Act as originally drafted, a disappointed buyer could not claim rescission and damages at the same time.⁹² To correct this shortcoming, some courts most sensibly took the position that the Sales Act was a "codification of contract, not of tort" and that a "regulation of contract-remedy did not touch tort-remedy."⁹³ Attempting to overcome the archaic notion that no action could be founded on the death of a human being and to give the plaintiff the benefit of a wrongful death statute courts have often pointed to the "basic tort character" of warranty liability.⁹⁴

88. KORINTENBERG, *ABSCHIED VAN DER GEWAERLEISTUNG*, JUSTIZBLATT FÜR DEN OBERLANDESGERICHTSBEZIRK KOELN (1947).

89. The liability of remote parties will be discussed in the second part of the article.

90. In Germany, tort law is of limited usefulness because German tort law in contrast to contract law does not recognize the *respondeat superior* principle. The master is only liable for the wrongful acts of his servant if he himself was guilty of fault in selecting or supervising. GERMAN CIVIL CODE § 831.

91. PROSSER & SMITH, *CASES ON TORTS* 828-29 (3d ed. 1962).

92. USA § 69(2). But there is case law which maintains that recovery of special damages is not prevented by rescission. *Russo v. Hochschild Kohn & Co.*, 184 Md. 462, 41 A.2d 600 (1945) (the majority resorting to USA § 70); 5A CORBIN, *CONTRACTS* § 1237 (1964). *Oliver-Electrical Mfg. Co. v. I. O. Teigen Constr. Co.*, 177 F. Supp. 572 (D. Minn. 1959); *McKendrie v. Noel*, 146 Colo. 440, 363 P.2d 880 (1961) (although there was a rescission, the damages awarded were actual, out-of-pocket expenditures). But there is case law going the other way. *Authorized Supply Co. v. Swift & Co.*, 271 F.2d 242 (9th Cir. 1959), *rev'd on other grounds on rehearing*, 277 F.2d 710 (9th Cir. 1960). Under the Uniform Commercial Code the buyer is no longer required to elect between rescission and recovery of damages. UCC § 2-608, Comment 1.

93. Llewellyn, *On Warranty of Quality, and Society — II*, 37 COLUM. L. REV. 341, 390 (1937). See, e.g., *McRae v. Lonsby*, 130 Fed. 17 (6th Cir. 1904) (earlier use of tort law to provide a remedy); Note, 45 YALE L.J. 1313 (1936) (collecting authorities).

94. *Greco v. S. S. Kresge Co.*, 277 N.Y. 26, 12 N.E.2d 557 (1938); *Jones v. Boggs & Buhl, Inc.*, 355 Pa. 242, 49 A.2d 379 (1946); *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P.2d 163 (1954); Note, 43 CALIF. L. REV. 546 (1955). There is a case law to the contrary. E.g., *Wadleigh v. Howson*, 88 N.H. 365, 189 Atl. 865 (1937).

An application of tort law to the area of disclaimer clauses has been suggested in the French literature,⁹⁵ and has begun to emerge in Anglo-American case law. The ever increasing and sweeping use of such clauses⁹⁶ was for a long time defended and upheld in the name of freedom of contract,⁹⁷ but recently has run into opposition. Statute and case law have always denied the shelter of a disclaimer clause to a seller guilty of fraudulent concealment or misrepresentation⁹⁸ and (in civil law countries) even to a seller merely with knowledge of a defect.⁹⁹ Going beyond this restriction, case law has attempted to protect the buyer by narrowly interpreting the disclaimer clause or by holding that it had not been incorporated into the contract.¹⁰⁰ Particularly in so-

95. Mazeaud, *supra* note 14, at 621.

96. Customarily a distinction is made between clauses excluding or modifying warranty liability and clauses limiting the available remedies. 2 RABEL 89-91; UCC §§ 2-316, 2-718, 2-719. Different policy considerations may apply to judicial control of these clauses. Contrast, e.g., UCC § 2-719 with § 2-316; but note that § 2-316 in turn is controlled by § 2-302. See the penetrating analysis in Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 280-84 (1963); HONNOLD, *op. cit. supra* note 46, at 112-13; Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 323-32 (1963).

97. See generally, 3 H. & L. MAZEAUD & TUNC, *TRAITÉ THÉORETIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE* ch. 9 (5th ed. 1960) (French law); Gower, *Exemption Clauses — Contractual and Tortious Liability*, 17 MOD. L. REV. 155 (1954) (English Law); Note, *Contractual Disclaimers of Warranty*, 22 WASH. U. L. Q. 536 (1937); 2 B.G.B.-R.G.R.K. § 459 Anm. 6(d).

98. Baglehole v. Walters, 3 Camp. 154, 170 Eng. Rep. 1338 (K.B. 1811) (artifice to disguise required); Ward v. Hobbs, 4 App. Cas. 13 (1878) (mere knowledge insufficient); L'Estrange v. Graucob, Ltd., [1934] 2 K.B. 394; General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W. 2d 655 (1960). See Curtis v. Chemical Cleaning and Dyeing Co., [1951] 1 K.B. 805.

99. E.g., GERMAN CIVIL CODE § 476; SWISS CODE OF OBLIGATIONS art. 199; FRENCH CODE CIVIL art. 1643.

100. For a collection of the case law and the theories advanced, see Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1132 (1962); Comment, *Warranties of Kind and Quality Under the Uniform Revised Sales Act*, 57 YALE L.J. 1389, 1400-04 (1948); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 329-30 (1963). Also see Durant v. Palmetto Chevrolet Co., 241 S.C. 508, 129 S.E.2d 323 (1963); Stevens v. Daigle & Hinson Rambler, Inc., 153 So.2d 511 (La. 1963) (redhibitory action); Guntert & Zimmermann, Sales Div., Inc. v. Thermoid Co., 31 Cal. Rptr. 99 (Dist. Ct. App. 1963); King & Wexler, *Commercial Law*, ANNUAL SURVEY AM. L. 319, 323-24 (1963).

Until recently, civil case law, by and large, seems to have preferred the technique of restrictive interpretation. 2 RABEL 187. The attitude of the German Law is illustrated by Reichsgericht, (V. Zivilsenat) July 8, 1931, 60 Juristische Wochenschrift 2719 (1931); S.H.E.M. Comp. m.b.H. v. B.u.a., Reichsgericht (II. Zivilsenat) Jan. 17, 1940, 163 R.G.Z. 21, 31; Bundesgerichtshof, March 15, 1956, Juristische Rundschau fuer Versicherungsrecht, 1956, 259. A bolder approach has been advocated by RAISER, *DAS RECHT DER ALLGEMEINEN GESCHAFTS-BEDINGUNGEN* § 27 (1935). According to Raiser, Civil Code § 138, which declares oppressive legal transactions void, gives insufficient protection. Section 138(2) outlaws transactions by which one person "profiting by the difficulties, indiscretions

called contracts of adhesion, courts have either interpreted disclaimer clauses out of existence or have declared them invalid outright for reasons of public policy.¹⁰¹ A tort remedy now has been added to this arsenal of mechanisms controlling freedom of contract and protecting the consumer. Reflecting and channelling a trend in recent case law in this country, Section 402A of the forthcoming Restatement of Torts (Second)¹⁰² imposes strict liability for physical harm on a professional seller of a food product which because of its "defective condition" is "unreasonably dangerous to the consumer." A comment to this section provides that the section "is not governed by the provisions of the Uniform Sales Act [or by the Uniform Commercial Code] and is not affected by limitations on the scope and content of warranties . . . in those statutes."¹⁰³ Thus tort law has here been used to strengthen a trend in the law of contracts.¹⁰⁴

Because of the limited scope of strict tort law, it will never make warranty law, in the narrow sense of the word, superfluous. Indeed, the provisions of

or inexperience of another person causes to be promised or granted to himself or to a third party for a consideration pecuniary advantages that exceed the value of the consideration to such an extent that, having regard to the circumstances, the disproportion is obvious." (Author's translation).

101. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (standard disclaimer clause of the Automotive Manufacturers Association incorporated in sales contract limiting liability to replacing parts at factory held void against public policy); *State Farm Mut. Auto. Ins. Co. v. Andersen-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Vandermark v. Ford Motor Co.*, 61 Cal. 245 (1964); *Clarke v. Army & Navy Co-op. Soc.*, [1903] 1 K.B. 155 (C.A.) (*culpa in contrahendo* by failure to give warning as to dangerous conditions of tin cans, known to seller). See *White v. John Warwick & Co.*, [1953] 1 Weekly L.R. 1285 (C.A.). The English Hire-Purchase Act, 1938, 1 & 2 Geo. 6, ch. 53, § 8(s), bars contracting out of the implied warranty of merchantability. According to UCC § 2-719(3), "limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

For a fascinating discussion of the "obligation du sécurité" imposing on the seller of a commodity a duty to give instructions as to the use of the commodity bought, even in the absence of a defect, see Mazeaud, *supra* note 14, at 618.

102. Restatement (Second), Torts § 402A (Tent. Draft No. 6, 1961).

103. *Id.*, Comment h. According to the same Comment, the requirement that the consumer give timely notice of the injury to the seller, provided for in the Uniform Sales Act, is inapplicable also. *Contra* UCC § 2-607, comment 5. Contributory negligence in contrast to voluntary assumption of risk also is no defense. Also see Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318, 330-32 (1963).

Cases illustrating the applicability of the voluntary assumption of risk principle to defeat a claim for breach of the implied warranty that food is reasonably safe to eat are: *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960); *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891 (S.D. Cal. 1955); *Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d 309 (Mass. 1964).

104. That this function of tort law is not limited to the field of sales is illustrated by the so-called "negligent delay" cases which aim at the protection of an insurable applicant for life insurance (or his beneficiary) against the risk of dying uninsured because of an unreasonably long delay in processing his application. For a discussion of the relevant case law, see 40 COLUM. L. REV. 1071 (1940).

the Uniform Commercial Code imposing responsibility for quality and dealing with the measure of damages are wide enough substantially to reduce the need for resorting to tort law. Under the provision of the Uniform Commercial Code on merchantability, a court might hold that a knife which injured a buyer because a furrier left it in a fur coat¹⁰⁵ constituted a defect in the merchandise. The imperfectly constructed stepladder selected by an old lady after an opportunity to inspect would also be considered defective since such present sales are also covered.¹⁰⁶ To the extent that a dealer is responsible for quality under the warranty law of the Code, finding a duty to inspect and a negligent violation of that duty become superfluous.¹⁰⁷ Since the Uniform Commercial Code has rejected the "tacit assumption test," the Code's measure of consequential damages should also be sufficient to make the injured buyer whole.¹⁰⁸

There remains the question of whether sales law should strive for unified treatment of the seller's responsibility under the contract.¹⁰⁹ Many sales laws, as we have seen, have heretofore tended to differentiate between delivery of defective goods in the technical sense of the word and delivery of goods of a different kind (*aliud*). Frequently, warranty law, with its special requirement that the seller be promptly notified, has been applied only in the former situation while the latter was left to be dealt with by the general law of contracts. Delivery of the wrong quantity also has often been excluded from the jurisdiction of warranty law.¹¹⁰ Some sales laws, unconvinced of the soundness of the distinction or despairing of the possibility of making this system work, have taken steps in the direction of a unified theory of nonconforming delivery. The German Commercial Code, for example, has extended the requirement of notice of the warranty law to cover both the delivery of an *aliud* and of the

105. *Miller v. Svenson*, 189 Ill. App. 355 (1914).

106. *Kirk v. Stineway Drug Store Co.*, 38 Ill. App. 2d 415, 187 N.E.2d 307 (1963); UCC § 2-314, Comment 1.

107. Warranty law, however, does not protect the customer who has not consummated his sale. *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E.2d 305 (1946). A case note, 49 COLUM. L. REV. 156 (1947), pointing out that at the time the decision was rendered the privity requirement prevented plaintiff from bringing a tort suit against the manufacturer. To protect the consumer, case law, occasionally, has imposed upon the dealer a rather stringent duty to inspect. *Santisne v. Martins, Inc.*, 258 App. Div. 663, 17 N.Y. S.2d 741 (1940). On the duty to inspect, see Eldredge, *Vendor's Tort Liability*, 89 U. PA. L. REV. 306 (1941); Leidy, *Tort Liability of Suppliers of Defective Chattels*, 40 MICH. L. REV. 679 (1942). See further *Ebbert v. Philadelphia Elec. Co.*, 126 Pa. Super. 351, 191 Atl. 384, *aff'd*, 330 Pa. 257, 198 Atl. 323 (1938).

108. UCC § 2-715, Comment 2. Case law and literature inform us, however, that tort law allows for a more generous measure of damages than contract law. 5 CORBIN, CONTRACTS § 1019 (1964 ed.); PROSSER & SMITH, CASES ON TORTS 796 (3d ed. 1962). For pre-UCC cases in which breach of warranty and a tort claim were combined, see, in addition to the *Ebbert* case, *supra* note 107, *Gilbert v. Louis Pizitz Dry Goods Co.*, 237 Ala. 249, 186 So. 179 (1939).

109. HONNOLD, *op. cit. supra* note 46, at 67.

110. See notes 19-22 *supra* and accompanying text.

wrong quantity. The extension of the notice requirement, however, applies only to contracts between merchants and does not protect the seller if the deviant delivery was so severe that he could not have justifiably anticipated acceptance.¹¹¹ The Uniform Sales Act, unlike the German Code, requires the buyer to notify the seller in all cases of nonconforming delivery.¹¹²

Aware of the soundness of a unitary treatment of all cases involving what may be construed as defective delivery, both the Uniform Commercial Code¹¹³ and the Uniform Law on the International Sale of Goods have worked out a unified treatment of nonconforming delivery. Article 33 of the International Code will be of particular interest to an American lawyer. It provides:

1. The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:
 - a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;
 - b) goods which are not those to which the contract relates or goods of a different kind;
 - c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;
 - d) goods which do not possess the qualities necessary for their ordinary or commercial use;
 - e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;
 - f) in general goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.
2. No difference in quality, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material.¹¹⁴

111. GERMAN COMMERCIAL CODE § 378.

112. The wording of § 49, "for breach of any promise or warranty," is wide enough to include all cases of nonconforming delivery. But the case law has not gone quite so far. In *American Mfg. Co. v. United States Shipping Bd. Emergency Fleet Corp.*, 7 F.2d 565 (2d Cir. 1925), noncompliance with the notice requirement was held to bar a claim based on delayed performance, but it was taken for granted that this notice requirement did not apply to a claim for nondelivery. In *Klein v. American Luggage Works, Inc.*, 52 Del. 406, 158 A.2d 814 (1960), § 49 was held applicable to nonperformance of a requirement contract. See generally 3 WILLISTON, SALES § 484(a), (b) (rev. ed. 1948) (collecting authorities). The function of § 49, according to the case law, is to ameliorate the harshness of the common law rule that mere acceptance by or passage of title to the buyer constitutes a waiver of any remedies for breach of warranty and at the same time to give the seller some protection against stale claims by requiring notice. *Whitfield v. Jessup*, 31 Cal. 2d 826, 193 P.2d 1 (1948) (applying provision to sale for immediate consumption and criticizing *Kennedy v. F. W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y. Supp. 121 (1923), which took a contrary view).

113. UCC § 2-601.

114. The requirement of perfect tender, frequently attributed to the common law of sales (33 COLUM. L. REV. 1021 (1933); 48 COLUM. L. REV. 161; 3 WILLISTON, SALES § 608-a (rev. ed. 1948)), has undergone a gradual process of erosion. USA § 45 softened

To implement this policy, Article 44 makes sure that "in all cases to which Article 33 relates, the rights conferred to the buyer by the present law exclude all other remedies based on lack of conformity of the goods."¹¹⁵

the harshness of the principle in the field of installment contracts. The Uniform Commercial Code still permits the buyer to reject goods before acceptance if they fail to conform "in any respect." Section 2-601. But the buyer can revoke an acceptance only if "nonconformity substantially impairs its value to him." Section 2-608. It further provides for "cure" of improper tender or delivery, § 2-508, and continues the development of the law in the area of installment contracts. Section 2-612. For constructive criticism of our law, Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949). For the distinction between warranties and conditions made by English Law, see SGA § 11(1)(b)(c); Stoljar, *Conditions, Warranties and Description of Quality in Sale of Goods — II*, 16 MOD. L. REV. 174, 183-90 (1953).

115. Ascertainment and notification of lack of conformity are dealt with in Art. 33-40.